No. 2623

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error from the United States District Court for the District of Alaska, Division No. 1

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United States Attorney.
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THE CASE.

The defendant, the Thlinket Packing Company, a corporation owning and operating certain fish traps located within Division Number One of the District of Alaska during the year 1914, was indicted in three cases being Nos. 1034-B, 1035-B, 1036-B, at August Term, 1914, of District Court, Division Number One, of Alaska for violating Section 5, Act June 26th, 1906, entitled "An Act for protection of the Fisheries of Alaska," by unlawfully and wrongfully maintaining and operating said traps "during the close seasons," to-wit, between the hours of "six o'clock post-meridian on Saturday and six o'clock ante-meridian on Monday" on the dates and at the places set out in said indictments, said violations consisting of a failure on its part to observe the provision of said statute, wherein it is made "unlawful to fish for, etc. * * * in any manner by any means, except by rod, spear or gaff, etc.," and it is further provided that during the "weekly close season herein prescribed *the gate, mouth, or tunnel* of all stationary and floating traps *shall be closed and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such a manner as to permit the free*

passage of salmon and otherfishes," said indictments charge that said company *did maintain and operate said traps for fishing* during the close season on the dates and at the places mentioned *and did fail to close the tunnels of said traps and fail to either lift or lower the twenty-five feet of webbing* as required by said statute, as set out in said indictments. Tr. pp. 2-8, 10-12, 15-22.

THE LAW VIOLATED.

ACTS OF CONGRESS.

(34 St. p. 479.—Compiled Laws of Alaska, Sec. 263.)

These indictments are drawn under the provisions of the fifth section of the Act of Congress approved June 26th, 1906, entitled "An Act for the protection and regulation of the Fisheries of Alaska," which section reads as follows:

> "Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock post meridian Saturday of each week until six o'clock ante meridian of the Monday following, or to fish for, or catch, or kill in any manner or by any ap-

pliance except by rod, spear, or gaff any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day in the week. Throughout the weekly close season herein prescribed the gate, mouth, or tunnel of all stationary and floating traps shall be closed and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such a manner as to permit the free passage of salmon and other fishes."

(34 St., p. 479; sec. 263 Comp. L. A.)

By this section, among other things, a weekly "close" season is established against fishing by means of "traps," which season begins at six o'clock P. M. on Saturday of each week and continues until six o'clock A. M. of the Monday following, during which time the Act (1) makes it unlawful for "any person, company, corporation, or association" to fish for salmon by any means except by "rod, spear, or gaff" in the waters of Alaska except in the waters of Bering Sea, the Delta of the Copper River, and Cook Inlet, and (2) *commands that the gate, mouth, or tunnel of all stationary and floating traps shall be closed and that twenty-five feet of the webbing or net of the "heart" of such traps on each side next to the "pot" shall be*

lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

Pursuant to Section 11 of said Act (34 St. p. 480; 269 Comp. L. A.), the Secretary of Commerce, prior to the year 1914, made, established and published among others the following rule and regulation:

> "All persons, companies, or corporations owning operating, or using any trap net, pound net, or fish wheel for taking salmon or other fishes shall cause to be placed in a conspicuous place on said trap net, pound net, or fish wheel the name of the person, company or corporation owning, operating, and using same, together with a distinctive number, letter, or name which shall identify each particular trap net, pound net or fish wheel, said lettering and numbering to consist of black figures and letters, not less than six inches in length, painted on white ground."

Complying with the above rule, the traps of this plaintiff in error, so many of them as are involved in this litigation, were marked "T. P. Co. No. 1" up to and including "T. P. Co. No. 12."

Section 13 of the same Act of Congress provides:

> "Sec. 13. That any person, company, corporation, or association violating any of the provisions of this Act or any regulation estab-

lished in pursuance thereof shall, upon conviction thereof, be punished" as therein provided. (34 St. p. 481; 271 Comp. L. A.)

CHARGES IN THE INDICTMENTS IN SHORT.

The first indictment (No. 1034-B) has six counts.

1*st Count.*

The first count charges that the plaintiff in error, a corporation then and there organized and existing as such, between the hours of six o'clock post meridian on Saturday, July 11, 1914, and six o'clock ante meridian on Monday, July 13, 1914, to-wit, on Sunday, July 12, 1914, in the waters of Icy Straits, near the mainland, abreast of Porpoise Island, Excursion Inlet, the same being the waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap known and designated as "T. P. Co. No. 1," without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

2*nd Count.*

The second count charges that during the same periods of time and on the same date and at

the same place said plaintiff in error was guilty of the same violation of law in regard to "T. P. Co. No. 2."

3rd Count.

The third count charges the same offense on the same date and in the same place in regard to "T. P. Co. No. 3."

4th Count.

The fourth count charges that on the same date and at the same place as set out in counts Nos. 1, 2 and 3 plaintiff in error did unlawfully and wrongfully maintain and operate for fishing a certain trap known and designated as "T. P. Co. No. 4" without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

5th Count.

Count No. 5 charges the same offense at the same time as set out in Count No. 4, in the waters of Icy Straits, mainland shore north of The Sisters, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska and within the jursdiction of this Court, in regard to "T. P. Co. No. 5."

6th Count.

Count No. 6 charges the same offense as set out in Counts Nos. 4 and 5, on the same date, in the waters of Icy Straits off the mainland near Ansley Island, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 6."

THE SECOND INDICTMENT.

The second indictment (No. 1035-B) has two counts.

1st Count.

The first count charges that the plaintiff in error, between the hours of six o'clock post meridian on Saturday, August 8, 1914, and six o'clock ante meridian on Monday, August 10, 1914, to-wit, on Saturday, the 8th day of August, 1914, within the water of Chatham Straits, west shore Admiralty Island, north of Funter Bay, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of the said District of Alaska and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap known and designated as "T. P. Co. No. 11" without having twenty-five feet of the webbing or net of the heart of such trap on each side next to

the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

2nd Count.

Count No. 2 charges the same offense at the same time and "in the waters of Lynn Canal, west shore of Admiralty Island, south of Point Retreat, the same being the waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jursdiction of this Court," in regard to "T. P. Co. No. 12."

THE THIRD INDICTMENT.

The third indictment (No. 1036-B) has seven counts.

1st Count.

The first count charges plaintiff in error, between the hours of six o'clock post meridian on Saturday, August 8, 1914, and six o'clock ante meridian on Monday, August 10, 1914, to-wit, Sunday, the 9th day of August, 1914, in the waters of Icy Straits, near the mainland, abreast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of the said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated

as "T. P. Co. No. 1," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lower in such manner as to permit of the free passage of salmon and other fishes.

2*nd Count.*

The second count charges plaintiff in error with violating said law at the same time and place mentioned in Count No. 1, in regard to "T. P. Co. No. 2."

3*rd Count.*

The third count charges a violation of the law at the same time and place as mentioned in Counts Nos. 1 and 2, in regard to "T. P. Co. No. 3."

4*th Count.*

The fourth count charges the plaintiff in error with the same violation of said law, on the same date and at the same place as mentioned in Counts Nos. 1, 2 and 3, in regard to "T. P. Co. No. 3-A."

5*th Count.*

The fifth count charges plaintiff in error with the same violation of law, at the same time and place as mentioned in Counts Nos. 1, 2, 3 and 4, in regard to "T. P. Co. No. 4."

6*th Count.*

The sixth count charges plaintiff in error with having violated the same law, at the same time mentioned in Counts Nos. 1, 2, 3, 4 and 5, in the

waters of Icy Straits, off the mainland near Ansley Island, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 6."

7th Count.

Count No. 7 charges plaintiff in error with the violation of the same law at the same time as mentioned in Counts Nos. 1, 2, 3, 4, 5 and 6, in the waters of Icy Straits off Entrance Island near Point Couverden, the same being the waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 9."

DEMURRERS TO THE THREE INDICTMENTS

To these three indictments, and to each count thereof, the plaintiff in error filed three separate demurrers, as set out in transcript pp. 22-30, 32-34, 36-43.

To indictment No. 1034-B there are assigned eight grounds of demurrer.

To indictment No. 1035-B four grounds.

To indictment No. 1036-B nine grounds.

FIRST INDICTMENT

GROUNDS OF DEMURRER TO INDICTMENT

No. 1034-B.

I.

That more than one crime is charged in said indictment aginst defendant.

II.

That said indictment does not state facts sufficient to constitute any crime against defendant.

In substance:

III.

(*a*) "That facts stated in Count One do not constitute a crime against defendant company,"—quoting the language of Count One.

(*b*) That said charge in said Count (One) is duplicitous and ambiguous and attempts to charge two crimes and does not substantially conform with the requirements of Chapter 7, Compiled Laws of the Territory of Alaska, being subdivision two, section 2147, of said Compiled Laws, in that the statement of facts in Count One and the other part of the indictment referring to Count One, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

IV., V., VI., VII., VIII.

GROUNDS OF DEMURRER TO INDICTMENT NO. 1034-B.

The 4th, 5th, 6th, 7th and 8th grounds of demurrer to indictment No. 1034-B are identical with the third count but aimed at separate counts, except the 6th, 7th, and 8th grounds also include a further allegation that the respective counts mentioned charged more than one crime. This is simply a repetition of the first ground of demurrer and hence all these grounds, viz. IV. V., VI., VII. and VIII. are included in and the same as the first three grounds of demurrer, and will therefore be so treated.

Thus all these grounds of demurrer, viz. IV., V., VI., VII. and VIII. to indictment No. 1034-B., are embraced in the first three grounds and will be so considered, except as applicable to the various facts.

SECOND INDICTMENT

GROUNDS OF DEMURRER TO INDICTMENT NO. 1035-B.

The four causes of demurrer to indictment No. 1035-B are the same as the first four causes of demurrer to indictment No. 1034-B, and will be treated as identical therewith, and need not be further noticed except as applicable to the various facts.

THIRD INDICTMENT

GROUNDS OF DEMURRER TO INDICTMENT NO. 1036-B

The first three grounds of demurrer to the indictment No. 1036-B are identical with the first three in indictments Nos. 1034-B and 1035-B except that 3rd ground in No. 1036-B the first ground of demurrer among others is repeated, but is in substance the same and will be so treated.

The 5th, 6th, 7th, 8th and 9th grounds of demurrer to indictment No. 1036-B are identical within themselves but aimed respectively at counts 2, 3, 4, 5, 6, 7, 8 thereof and are also identical with the third ground of demurrer to indictment No. 1036-B. which is itself identical with the third ground of demurrer to indictment Nos. 1034-B and 1035-B. Therefore must all be treated the same.

RECAPITULATION

It therefore appears that causes of demurrer Nos. I, II and III are one and the same in all three indictments.

Cases of demurrer Nos. V., VI., VII. and VIII. to indictment No. 1034-B are no more than cause of demurrer No. III to said indictment, and are the same.

Causes of demurrer to indictment No. 1035-B

are the same as I, II, III and IV to indictment No. 1034-B.

Causes of demurrer Nos. IV, V, VI, VII, VIII and IX to indictment No. 1036-B are identical with causes or demurrer Nos. I, II and III in all the indictments.

THINGS EQUAL TO THE SAME THING ARE EQUAL TO EACH OTHER

Therefore causes of demurrer Nos. I, II and III are identical in all the three indictments and embrace all the other causes of demurrer in all three indictments. Therefore we need only discuss causes of demurrer I, II and III, in all the indictments.

BUT FIRST AS TO THE SUFFICIENCY OF THE INDICTMENTS.

The statute in question makes it unlawful to *fish for*, or kill any salmon, etc., during the prohibited season and prescribes what shall be done by operators of fish traps, viz. that the *gate, mouth or tunnel shall be closed and that twenty-five feet of the webbing or net of the heart of such traps on each side of the pot shall be lifted or lowered in* such a manner as to permit the free passage of salmon and other fishes.

Now the indictment charges just this offense,

viz., that the defendant during the prohibited season "did unlawfully and wrongfully

maintain and operate for fishing a certain trap known as Trap No. &c.—*without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.*"

Some counts further allege that "*without having the tunnel of such trap closed.*"

By all the authorities this allegation is entirely sufficient.

It charges the exact violation set out in the statute, i. e., *the unlawful fishing during the prohibited season* and it tells how that unlawful act was accomplished, viz. by *maintaining and operating said traps* during said prohibited season by failing to comply with the provisions of the law in that it failed *to either open the tunnel or lift or lower the webbing or net* in the manner provided by the statute, that is by *either lifting or lowering twenty-five feet of the same* as provided in the statute.

Had the indictment simply charged unlawful fishing during the close season without stating the manner in which the same was done the indictment would have been insufficient, for lack of description of the offense.

MANY MEANS

Many means of violating a statute may be set out in the statute, and so in the indictment, without making the same double. This is well recognized by all authorities.

"Some single offenses are of a nature to be committed by many means, or in one or another of several varying ways. Thereupon a count is not double which charges as many means as the pleader chooses, if not repungant; and, at the trial, it will be established by proof of its commission by any one of them."

Bish. New Cr. Proc. vol. 1, sec. 434 and authorities there cited.

"On Statutes. A statute often makes punishable the doing of one thing or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses."

Indem, sec 436.

"Many acts,—if together they constitute but one offense, may be laid in one count. Thus,

—selling intoxicants to drunkards—it was not duplicity to aver, in one count, that on the specific day the defendant A did sell, and did offer to sell, by himself and by an agent, wines, spirituous liquors, and other intoxicating beverage to one B, addicted to habits of intoxication, said A knowing him to be so addicted, and B being also a common drunkard. For here but one offense appears."

Idem, sec. 438.

DIFFERENT METHODS OF COMMITTING OFFENSE

"Where an offense may be committed by different means, a single count may charge all, and proof of any one will sustain the allegation. The limit is that the means must not be repungant. Still, whether repungant or not, the pleader may, if he prefers, employ a different count for each varying set of means, and he must do so [only] when they are inconsistent with one another."

Idem, sec. 453, sub-sec. 2.

To the same effect Bishop on Statutory Crimes, sec. 224, is as follows:

"Provisions in the alternative are common in legislation; and the rule is, that whatever is within any one disjunctively connected clause is within the statute. Thus—

"Alternative Offenses.—If, as is common

in legislation, a statute makes it punishable to do a particular thing specified, 'or' another another thing, 'or' another, one commits the offense who does any one of the things, or any two, or more, or all of them. And the indictment may charge him with any one, or with any large number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction 'and' where 'or' occurs in the statute. 'The rule,' it was once observed, 'is undoubtedly limited in its application to cases where the offenses created in a statute are not repugnant.' And, whatever be the form of the allegation, the proof need sustain only so much of it as constitutes a complete offense."

Bishop on Stat. Crimes, sec. 244
and authorities there cited.

SUBSTANTIAL REQUIREMENTS OF AN INDICTMENT

Mr. Bishop is his work on Criminal Procedure, discussing the elements of an accusation, first lays down the element of certainity and says:

"There are many reasons for it, helpful toward a comprehension of its degrees and force; as, to quote from DeGrey, C. J., that the defendant may know what crime he is 'to answer'; that the jury may appear to be

warranted in their conclusion of 'guilty' or 'not guilty' upon the premises delivered to them; and that the Court may see such a definite crime that they may apply the punishment which the law prescribes."

And further, the same authority gives another collection of reasons—is by Starkey given from the old books; thus,

"To identify the charge on which the grand jury proceeded, so that the trial shall be for the offense meant; to protect the accused from a second prosecution for the same offense;"

"To warrant the Court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of the case;"

"To enable the defendant to prepare for his defense in particular cases, to plead in all;"

"To give him the means of submitting by demurrer the question of his guilt to the Court; to guide the Court in the punishment."

Idem, sec. 507.

"All facts which constitute the crime should be given, without inconsistency or repugnancy," but not necessarily more.

Idem, sec. 509.

"Words of the indictment,—except a few

technical terms, and those of a statute, if drawn thereon, will suffice if used in their ordinary and non-professional import."

Idem, sec. 509, sub-sec. 3.

Further quoting the same authority—

"The rule is, says Chitty, 'that where a matter is capable of different meanings, that will be taken by the Court which will support the proceedings, not that which would defeat them, and the language is properly to be construed 'in that sense in which the party framing the charge must be understood to have used it, if he intended his accusation to be consistent.' Such is the rule in all writings; namely, the Court leans to the interpretation which will make them effectual, avoiding what would render them null."

Idem, sec. 510, sub-sec. 2.

"*The Exact Words of the Statute*—will with rare exceptions be practically best; because thus all doubt will be avoided and simply the proof demanded by the law, and no more, will be called for by the indictment. Still, not always is such identity of words indispensable.

"We derive from all the results that it must employ so many of the substantial words of the statute as will enable the Court to see on what one it is framed; beyond which, it must have whatever other of these statutory

words are, either mingled with other words or not as the case requires, essential to a complete description of the offense; or if the pleader chooses words which are either equivalent in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise' would be sufficient.

Idem, sec. 612, sub-secs. 2 and 3 and authorities cited thereunder.

We can therefore see no reason why the indictment in this case does not fully comply with all the requirements of the law as it certainly embraces all elements of the offense charged and is charged in the exact words of the statute or words of equivalent meaning.

FIRST GROUND OF DEMURRER.

The first ground of demurrer "is that more than one crime is charged."

MORE THAN ONE CRIME CHARGED.

An Act of the Legislature of the Territory of Alaska, approved April 26, 1913, entitled "An Act to amend section 43 of Title 2 of the Act of Congress approved March 3, 1899, entitled, An Act to define and punish crimes in the District of Alaska, and to provide a Code of Criminal Procedure for said District," provides as follows:

"When there are several charges against

any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

(Session Laws, Alaska, 1913, p. 65.)

Under this statute two or more acts or transactions connected together or two or more acts or transactions of the same class of crimes or offenses may properly be joined in one indictment having separate counts.

This is a wise statute and intended to prevent multiplicity of trials. Complaint in error has stated no reason why this statute is not valid and can state none.

SECOND GROUND OF DEMURRER.

The second ground of demurrer "that said indictment does not state facts sufficient to constitute *any crime*," is certainly inconsistent with the first ground which charges that it embraces *more than one crime.*

But we have shown that the indictment *may charge more than one crime.*

The indictment charges that said defendant

did unlawfully *maintain and operate for fishing* during the close season and at the times and places mentioned, "*without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.*"

This is charging the offense *in haec verba* of the statute except the statute says: "It shall be unlawful to fish for" etc. while the indictment describes the offense by charging "did *unlawfully maintain and operate for fishing*, etc."

Now it is clear that *to maintain and operate a fish trap for fishing* is simply another way of saying did fish by means of a fish trap. To "*operate for fishing is to fish.*" Now if defendant did *fish by means of a fish trap* in the manner and under the circumstances set out in the indictment then surely the law would be violated.

Tested by all the rules of the text writers it would seem that this indictment is sufficient.

All the ingredients of the crime can be accurately and clearly perceived in these counts. See

United States vs. Cook, 17 Wall 168

United States vs. Carll, 102 U. S. 612

It is sufficient if it is in the substantive words of the statute, without any expansion.

United States vs. Simons, 96, U. S. 360.

THIRD GROUND OF DEMURRER

It will be noticed that the third ground of demurrer to the indictment charges:

(a.) that the facts stated in Count One do not constitute a crime against the defendant company, and then undertakes to set out the language of Count One. This is no more than a repetition of ground two but is simply adding to the charge that no crime has been charged, a further statement of the very thing which was contemplated and aimed at in the second ground of demurrer and does not make the demurrer any stronger or add any force whatever to it. Therefore, if the second ground of demurrer was not well taken, this part of the third ground of demurrer could not be valid.

(b.) The third ground of demurrer also embraces a charge that said Count One is duplicitous and ambiguous and attempts to charge two crimes and does not substantially conform with the requirements of Chapter 7 of the Compiled Laws of the Territory of Alaska, being sub-division 2 of section 2147 of the Compiled Laws of the Territory of Alaska. And that said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

We admit our inability to fully characterize this assignment of demurrer. It is "broad and

general as the casing air." It is like a great mist. It reaches out and covers up all that has preceded it and all that is to follow after. It is like a great German gas bomb. It envelopes the entire army, but unlike it, it has no poisonous quality. It struggles to assign at least one reason why the indictment is bad, and in so doing attempts to assign many and hints at others, but really assigns no valid one. It says the indictment is duplicitious. It says it is ambiguous. It says it attempts to charge two crimes. It says it does not conform to sub-sec. 2 of Sec. 2147 of the Compiled Laws of Alaska. It says that it is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime is charged, but it gives no reasons for any of these allegations. It is a re-hash of all that has been said before, and it is more.

A demurrer should be an orderly and succinct statement of reasons why a certain pleading is insufficient. It should state those reasons as separately one at a time by numbers and each reason should be clear legal reason for the charge it makes.

AS TO THE SUFFICIENCY OF THE DEMURRERS.

It is not sufficient in a special demurrer to assign as special cause in general that the pleading is double or lacks form. It must show in what the

duplicity consists, or wherein the form is deficient.

94 Ill. 440, *Holmes vs C. & A. R. R. Co.*

A demurrer which states the ground of demurrer to be "That the plea is double and alleges two grounds of defense" is not a sufficient specification of duplicity and can not be considered. It should state in what the duplicity consists.

Kipp vs. Bell, 86 Ill. 577.

Chitty, in his work on Pleading, vol. 1, p. 706, says that it is not sufficient in specifying grounds of demurrer to say the pleading is double or wants form but it should show in what the duplicity consists. That causes of demurrer shall be specially assigned and not involved in general unapplied expressions of "double," "negative pregnant," "uncertain," "want of form" and the like but shall show "wherein," in order that the other party may either join in the demurrer or discontinue, etc.

Therefore the demurrer should state wherein more than one crime is charged, or wherein it is ambiguous, or wherein the duplicity consists, or wherein it fails to comply with sub-sec. 2 of Section 2147. Tested by these rules this demurrer must fail for it does not say wherein the indictment is either duplicitous or ambiguous or wherein it attempts to charge two crimes or wherein it does not conform to sub-sec. 2 of Sec. 2147, C. L. A. or why a man of common understanding could not

know what is intended thereby or what crime, if any, is intended to be charged. We insist that the indictment is in absolute conformity with sub-sec. 2 of Sec. 2147 C. L. A.

For all the reasons stated above we therefore insist that all the demurrers filed in the three cases are invalid, and were properly over-ruled.

FAILURE TO SUSTAIN ATTACK ON INDICTMENTS.

Learned counsel for plaintiff in error have wisely refrained from attempting to support their various demurrers by argument, except in a very limited and partial manner.

They have simply been content to *demur*, but have made no effort to elucidate their positions by a discussion of the questions involved. They have cited no authority to aid the Court in reaching its conclusions.

At the inception of this legal battle, like brave soldiers they rushed to the front and planted these many demurrers like so many Howitzers threatening death and havoc in every direction, but in the roar of battle and din of carnage they have forgotten to fire the fuse, and in the hour of defeat they have dragged them off the field in all their ponderous bulk and safely stored them away in the transcript where they now lie in innocuous desuetude as silent and pathetic relics of cherished

memories, but whose usefulness has long since ceased. *Pax vobiscum.*

ORDERS OVERRULING DEMURRER.

Order overruling demurrer and entering plea of "Not Guilty" to indictments No. 1034-B, 1035-B, 1036-B.

Tr. pp. 31, 35, 44.

CONSOLIDATED BY CONSENT.

Order entered October 27, 1914, calling for an open venire and "by *consent the three indictments*, Nos. 1034-B, 1035-B, 1036-B, were *consolidated* for the purpose of trial."

Tr. p. 151.

OBJECTIONS TO TRIAL.

There appears in the Transcript, pp. 152-154, a paper denominated "Objections" signed by attorneys for the defendant, the plaintiff in error. This paper bears no date or file mark and does not appear ever to have been regularly filed in the cause. It is in the main a restatement of the several grounds of demurrer which had heretofore been aimed at the indictment and had been overruled. These objections were overruled by the Court.

Tr. p. 154.

This manner of pleading is unknown to the forms of practice and was properly disregarded by

the Court. Even if the objections were considered and passed upon, still it is very evident that they are nothing more than alleged reasons which had been specifically overruled in passing upon the various demurrers above set out.

It is stated in the caption of these "Objections" that they were offered after the empaneling of the Jury and after the first witness on behalf of the plaintiff had been sworn. These Objections are repeated and set out in the Transcript a number of times with great prolixity and redundancy for what good purpose it would be difficult to say.

Tr. pp. 59-64, 79-90, 100-114, 152-154.

The practice of attacking the sufficency of indictments by the objection to the introduction of evidence thereunder is not recognized in the Federal courts.

Miller vs. U. S. 161 Fed. 672.

TRIAL ORDERED TO PROCEED.

Upon the overruling of said "Objections" the trial proceeded by the examination of witnesses in behalf of the Government.

Tr. p. 154.

PLAINTIFF'S WITNESSES AND SUBSTANCE OF THEIR TESTIMONY.

On the trial of the cause plaintiff introduced the following witnesses:

J. W. Bell
Tr. pp. 267-269.

Jesse L. Neville
Tr. pp 220-239.

Ernest P. Walker
Tr. pp. 151-220.

Harry Ward
Tr. pp. 239-267.

J. W. Bell was examined for the purpose of producing the articles of incorporation of the Thlinket Packing Company, upon the presentation of which it was agreed that, without burdening the record, the defendant admitted that said company is incorporated.

Tr. p. 267.

Said witness also produced in evidence a calendar for the year 1914, showing that the 8th of August, 1914, was Saturday, Sunday was the 9th, etc.; and that the 11th of July, 1914, was Saturday, and that the 12th of said month was Sunday.

Tr. pp. 268, 269.

Jesse L. Nevile telstified, in substance, that he was master on the Santa Rita, a boat chartered for the U. S. Fish Bureau Commission, that between the hours of six o'clock Saturday, July 11, 1914,

and Monday morning, July 13, 1914, at six o'clock he made a trip to the fish traps belonging to the defendant company, that he visited traps Nos. 1, 2, 3, 4, 5 and 6.

Tr. pp. 222-226.

His testimony shows that the tunnel of said traps leading into the pot of the trap was open during this time, i. e., on Sunday, and further that twenty-five feet of the webbing or net of the heart of the trap on each side of the pot was only open about the space of one or two feet.

Tr. p. 227.

He shows that on August 9th, which was Sunday, he visited trap No. 11 and that said webbing was not lifted or lowered for twenty-five feet but approximately ten or eleven feet, the opening being at the top of the webbing, and the opening at the water's level did not exceed six or seven feet. The same in regard to traps Nos. 1, 2, 3, 3A on said date.

Tr. pp. 228-230.

ERNEST P. WALKER'S TESTIMONY.

Mr. Walker testified that he was warden of the United States Bureau of Fisheries, Alaska Service, and that he knew the defendant's traps Nos. 1, 2, 3, 3A, 4, 5, 6, 9, 11 and 12. He presented a model of the fish traps.

Tr. pp. 154, 155.

That he made a patrol of traps Nos. 1, 2, 3, 4, 5 and

6 during the weekly close season beginning at six o'clock post meridian Saturday, July 11, 1914, and ending at six o'clock ante meridian Monday, July 13, 1914.

Tr. p. 158.

That twenty-five feet of the webbing of trap No. 1 on each side of the pot next to the heart was not open twenty-five feet.

Tr. p. 159.

Exhibits to the jury the model trap and points out the heart walls.

Tr. p. 160.

Testifies that twenty-five feet of the webbing of the heart of trap No. 2 was not lifted or lowered in the manner required by law and that it was not open twenty-five feet back from the pot. He testified the same as to trap No. 3, and also as regards No. 4.

Tr. pp. 160, 161.

He testifies the same as to trap No. 5, and further that the tunnel to the trap was not completely closed. As to trap No. 6 he testifies the same as to Nos. 4 and 5.

Tr. pp. 162, 163.

He testified that the webbing of the heart walls on each of these traps was not open as required by law and that an attempt or pretense had been made of opening each one, and, referring to notes made at the time of inspection.

Tr. p. 163.

He states that trap No. 1 was visited at 9:45 A. M. the morning of the 12th and that the heart wall was open approximately four feet, that for the remainding distance, twenty-one feet, the webbing was in position for fishing.

Tr. p. 164.

That the heart walls of No. 2 at this time were opened back four feet at the water's level and that the balance of twenty-one feet was in perfect fishing condition.

Tr. p. 164.

As to trap No. 3, that the heart wall was open two feet and that balance of the netting was in its normal condition, that the remaining twenty-three feet was not lowered or raised.

Tr. p. 165.

As to trap No. 4 he could not state exactly but thought it was open less than twenty-five feet. As to trap No. 5, the opening in the heart walls did not exceed four feet. As to trap No. 6, he testified that the opening on one side was about one foot and the other about three feet and that the remaining part of the webbing of the heart was not raised or lowered or otherwise opened.

Tr. p. 166.

He further testified that during the close season beginning at six o'clock post meridian, August 8th, which was Saturday, and ending Monday morning, August 10, 1914, at six o'clock ante meridian

he visited traps Nos. 11 and 12, that the heart walls next to the pot of trap No. 11 were not raised or lowered for a distance of twenty-five feet and that he took a photograph of this trap on the Monday morning following.

Tr. pp 166, 167.

He testified that the tunnel had been drawn out into the pot and changed from what it was on Sunday but that the heart walls had not been changed. And said photograph was offered in evidence and marked "X."

Tr. pp. 168, 169.

He further testified that on the same trip, that this is August 8th, and during the close season, he visited trap No. 1 and that the webbing or net of the heart thereof was not opened or raised for twenty-five feet and that the tunnel of the trap was not opened at least one foot.

Tr. p. 170.

That he also visited trap No. 2 at the same time and that the webbing or net of the heart was not raised or lowered for twenty-five feet, and, in reply to a question as to the condition of the tunnel on that occasion the reply was, "It was open approximately 18 inches." As to trap No. 3 he stated that the webbing was not opened for twenty-five feet, either raised or lowered, and that the tunnel had a slight opening remaining in that. As to trap No. 4 on the same occasion, he testified that the webbing, etc., was not raised or lowered for twenty-

five feet and that the tunnel was "merely slacked away—that is not pulled to one side, not completely closed."

Tr. pp. 171, 172.

As to trap No. 3-A, the heart walls were not raised or lowered or otherwise opened for twenty-five feet next to the pot. The tunnel was open about a foot.

As to trap No. 6 on said occasion, the webbing, etc., was not raised or lowered or otherwise opened for a distance of twenty-five feet next to the pot, and the tunnel was opened only 18 inches to 2 feet.

Testified further that as to trap No. 1 the webbing, etc., next to the pot was not opened a distance of twenty-five feet, neither raised nor lowered nor otherwise opened, and that "so far as could be seen was open below the water level, that is pulled into the pot."

Tr. pp. 172, 173.

He further testified, in answer to a question, how wide was the entrance to the heart of the trap where the lead intersects the heart, as follows. "On each side of the lead it would be approximately 10 feet, may be a little over, may be a little less.

Tr. p. 197.

He testified that the size of the pots of these traps enumerated in the indictment are approximately 40 x 40 feet.

Tr. p. 198

He testified that the traps were situated in the First Division of Alaska and in the waters of Icy Straits and Chatham Straits in that District.

Tr. p. 199.

He testified that the defendant company's traps were all marked T. P. Co., followed by numbers 1, 2, 3, 4, etc., and that he had not testified concerning any traps that did not belong to the defendant company.

Tr. p. 200.

And that said traps are net traps or fish traps and are stationary.

Tr. p. 201.

He testified that the length of the piles of these traps was approximately 70 ft.

Tr. p. 202.

He further testified that the short shove-down is attached to the long shove-down approximately about 30 feet, in one instance 24 feet.

Tr. p. 202.

He testified that the exhibit, model of trap, was substantially a copy of the traps mentioned in the indictment.

Tr. p. 203.

He explains the model.

Tr. p. 205, 206, 207.

HARRY WARD'S TESTIMONY

Mr. Ward testified that he was with the U. S. Fish Commissioner on the trip made July 11, 1914.

Tr. p. 239.

That on July 12th, in the forenoon about 9 o'clock, they reached trap No. 1. He testified that they reached trap No. 2 on the same occasion, that they started at trap No. 6 and went up to 1 on those particular traps; that he observed trap No. 3; didn't see No. 2; that this was on Sunday.

Tr. p. 242.

That he noticed the short shove-down, the top of which was around the first pile just back to the first pile about 12 feet, and that the 25 feet was not raised or lowered.

Tr. p. 243.

That he noticed trap No. 4, and that the shove down was back on a slant about 12 feet.

Tr. p. 243.

That he noticed trap No. 5, that the webbing, etc. was not raised or lowered 25 feet, was about like the others, about 12 feet.

Tr. p. 244.

That he visited trap No. 6 but didn't examine it.

Tr. p. 245.

He states that on August 8th about 9 o'clock in the evening he visited traps Nos. 11 and 12 and that the webbing, etc., was not lifted or lowered 25 feet.

Tr. p. 245, 246.

That the shove-down was back about 10 or 12 feet at the top.

Tr. p. 246, 247.

That on August 9th he visited traps Nos. 11 and 12.

Tr. p. 247.

That on the same date he visited trap No. 1 and that the webbing, etc. was not back for 25 feet but only 10 or 12 feet, that the short shove-down was back a distance of 10 or 12 feet on a slant lashed to the middle of the shove-down; and that the shove-down in each of these cases was fastened.

Tr. p. 248.

He testified that the shove-down would extend downward from the top of the capping for about 25 feet.

Tr. pp. 250, 251.

And that this was the condition in each of the traps; that on August 9th the webbing, etc., on trap No. 1 was not lowered or raised 25 feet; and that trap No. 2 was in the same condition. That trap No. 3 he does not think was closed, the webbing, etc., was not lowered or lifted 25 feet, and he describes the shove-down as he did in the other cases. That he thinks he noticed trap No. 3-A because it had a wire tunnel. He said: "And I don't think it was absolutely closed," and that the webbing, etc., was not lifted or lowered 25 feet.

Tr. pp. 253, 254.

That he visited on that occasion trap No. 4, that it was not closed at all, that the webbing, etc., was not lifted or lowered 25 feet; that he also visited trap No. 6 on that occasion and that the tunnel was open about 2 feet.

Tr. pp 254, 255.

And the webbing, etc., was not lifted or lowered 25 feet. He explained by saying that the opening was not 25 feet from the heart on the part next to the walls and that there was a space next to the pot in the heart where it wasn't so opened.

Tr. p. 255.

That he visited trap No. 9 at the same time but does not recall the examination of it.

Tr. p. 255.

TESTIMONY OF PLAINTIFF IN ERROR

The testimony offered by the plaintiff in error in no way tends to disprove the essential facts proven by the testimony for the defendant in error. Plaintiff in error contented itself with a general description of fish traps and the manner of the operation of the same and as to the habits of fishes, etc., but did not attempt to deny the facts which sustain the indictment in these causes, and hence they need no discussion. This appears from a reading of the evidence introduced by plaintiff in error and it would not be necessary here to quote any of said evidence because it would simply necessitate a repetition of the entire evidence and of course that

would hardly be proper under the circumstances.

Therefore, the facts charged in the indictment stand approved.

It is true that it is insisted that under the proof there is shown a partial compliance with the law, viz. by *partly* closing the tunnel and opening a *small* distance in the webbing or net of the heart. But as this will be fully noted in the discussion of the charge of the Court it need not here be further noted.

ARGUMENT ON FACTS OF THE CASE

It will be especially noted that the plaintiff in error introduced no evidence to contradict the facts proven, a resume of which has been given in the former part of this brief. The only effort made by plaintiff in error seems to have been done with the intention of involving the Court in some error of law and may well be discussed in the discussion of the assignments of error.

But in order that our contentions may be fully understood by the Court we will discuss the facts of the case without unnecessary detail.

DESCRIPTION OF FISH TRAPS

The traps mentioned in these indictments and maintained by the plaintiff in error are trap nets and are described in the evidence as follows:

They consist of a lead, a heart, two tunnels, a pot, a spiller (tr. 156-7), and sometimes an addi-

tional contrivance is provided, called a "jigger" (tr. 285.) They are constructed by driving piles, placed about 10 feet apart, (tr. 188) into the bed of the sea from the shore outward and attaching webbing (either cotton webbing or wire netting) to the piles (tr. 206). The lead consists of a row of piles driven as above from the shore out to deep water where the trap is to be located, a distance varying according to the location of from 100 feet to one mile (tr. 205). The webbing or netting on the lead and on the heart extends the whole length of the lead (tr. 205) and around the heart walls, except where the lead enters the heart, and down to the bottom of the sea (tr. 208). The webbing or netting on the pot and spiller extends down a distance of 40 feet (tr. 209). The lead consists of a single row of piles, as above stated, with the webbing attached thereto. The heart is so called because of its shape; the base of the heart faces the shore and the lead enters into and through the base of the heart, leaving an opening in the heart sometimes on each side of the lead and sometimes leaving an opening on one side only of the lead, the opening varying in width from ten to fifteen feet (tr. 197, 198, 211). The piling of the heart, the pot and the spiller is generally capped (tr. 201), upon which a person way walk all around those portions of the trap (tr. 237-238). The apex of the heart joins to the pot. The piling at the apex of the heart

at its junction with the pot, is about 70 feet deep (tr. 202) and the distance between that piling and the pile next from the pot shoreward in the heart wall is approximately 10 feet. (tr. 188, 191). Constructed inside of the pot, which is about 40 ft. square, and leading from the heart into the pot, is a tunnel made of webbing, which has an opening of about 10 ft. at the heart end of the tunnel and from 6 inches to a foot wide at the inner end of the tunnel within the pot (tr. 279), somewhat similar in design to that of an old fashioned rat trap (tr. 206); and there is another tunnel of webbing similar in design in the spiller and of about the same dimensions, leading from the pot into the spiller (tr. 207). At the junction of the heart and the pot there is a long pile or pole to which the webbing which surrounds the heart is attached, by means of which pole the webbing is shoved down to the bottom of the sea at that point, hence it is called a "shove-down." Attached to this shove-down is a shorter pole or pile, about 24 ft. long; this is known as the "short shove-down" and is fastened to the long shove-down at a point about 24 ft. below the capping (tr. 182, 202), to which short shove-down the webbing is attached from its lower end to its top. This "short shove-down" counsel has renamed in these cases as the "pull back" or "closing stick." (tr. 183).

Some traps have a device which is called a

"jigger", which is a row of piles driven at an angle to the base of the heart, on each side when there are two entrances to the heart, otherwise on the side with the opening or entrance, with a hook (that is, piles driven in the form of a semi-circle or hook) at the end farthest from the heart, on which webbing is also stretched for the purpose of intercepting any fish which may back-track through the entrance into the heart, or fail to enter the heart; they will strike this jigger which will cause them to turn into or back into the heart (tr. 285). This device is a stationary trap net or fish trap (tr. 201); is a pretty effective means of catching fish (tr. 280); there is no other device known which is more effective (tr. 289). This description may be aided by reference to the photographic illustration shown on page 47 herein taken from the report of Dr. E. Lester Jones, Dep. Com. Fisheries.

OPERATION OF TRAPS

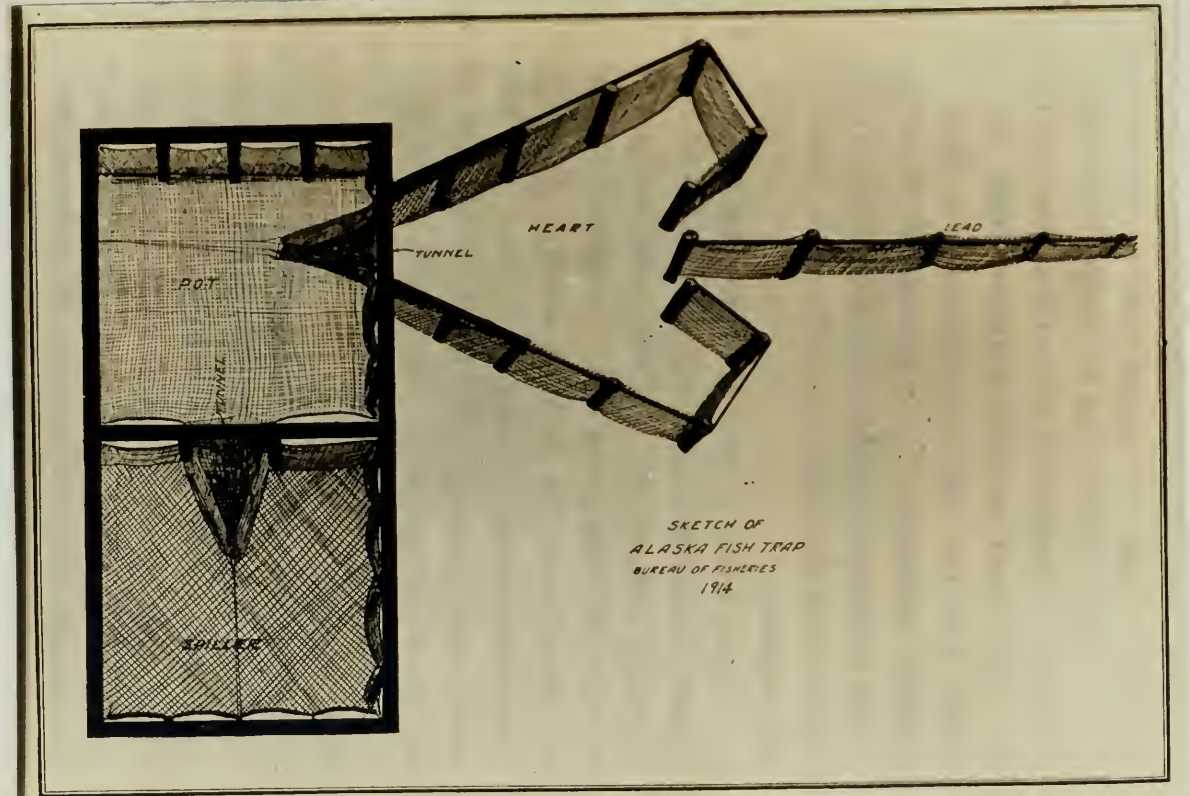
As the fish are on their way to the spawning grounds (tr. 276), (which are up the streams that empty into the sea), they travel along shore and encounter the lead of the trap, which they follow until finally they work themselves into the heart (tr. 276). They will work around the heart against the web to the entrance of the tunnel, which is constructed to lead them into the pot, (tr. 294), into which they work (tr. 278, 284), and finally work

through the tunnel from the pot into the spiller. These tunnels both in the pot and in the spiller are generally made "V" shape with a narrow opening at the inner end, so as to prevent the fish from returning through the tunnel into the pot or heart (tr. 279), and, as stated above, from the spiller, which like the pot is practically a large basket made of webbing, 40 ft. square, 40 ft. deep, with a web bottom, suspended within the piling, they are brailed into the boats or scows and transferred to the cannery.

Thus when a trap is once constructed and in repair *it automatically begins to fish and continues to catch fish, night and day, and every day, and every night, and every hour, as long as the fish run, or throughout the fishing season (which season commences about July (tr.* 181) *and ends about October, about three months), unless put out of fishing form as required by the statute. And, of course, the owner of such trap is fishing while the trap is in operation.*

The law requires that during the thirty-six hours close season prescribed therein *the tunnels of such traps shall be closed and that* 25 *feet of the heart webbing on each side of the heart next to the pot shall be lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.*

Thirty-six hours a week is approximately one-fifth of a week—or 20 per cent. of the time, there-



Sketch of Alaska fish trap.

fore the law requires the traps to be out of commission; this in order to prevent the total annihiliation of the fish. The last report of the Governor of Alaska (1915) shows that the value of the annual fish pack of this Territory is over $21,000,000; this catch and pack is accomplished within the space of three months, and one-fifth or 20 per cent. of this pack means to the packers over $4,000,000; that is what cessation of fishing during the close season means to the packers. Perhaps this is incentive enough to the plaintiff in error to father the wish that these provisions be so construed as to permit them to catch fish during the close season and still pretend to comply with the law.

The act providing among other things, for a close season each week of thirty-six hours, also provides in what condition the traps shall be maintained during the close season—it provides that they shall be adjusted in the manner stated—this to make effective the close season. It says that the *tunnels shall be closed* and that at the same time 25 *feet of the heart webbing shall be raised or lowered* in a particular way for a particular purpose.

This provision for the maintenance of the traps is one of the provisions of the Act, the violation of which renders a person liable to punishment; it is not complied with by simply closing the tunnels, nor is it complied with by*opening the heart webbing;* the law says that *both* must be done. The law

is violated if *neither* is done, and the law is violated if *only one* of them is done, and, therefore, the counts in this indictment on that head are not open to attack. "The evident purpose of that section" is exactly what it says, i. e., to keep the traps in the condition commanded by the Act during the close season—*when kept in this condition they cannot fish; when kept otherwise they do fish.*

But what was plainiff in error's pretended compliance with the law? It did not lift the webbing, nor did it lower it, nor did it pretend to. It merely interjected a new word into the statute, "pull back." Attaching the heart webbing to the short shove-down, about 24 feet long, vertically, it pulled the top of this shove-down back four to ten feet, sometimes, as far back as the first pile is, a distance of ten or twelve feet, displacing so much of the webbing as was attached to the shove-down, a little sliver of webbing from four to ten feet wide at the top and angling to nothing at the bottom, twenty-four feet below the capping. None of this webbing was lifted or lowered, four to ten feet of it was pulled back at the top, and twenty-four feet below nothing was pulled back and none of the webbing was disturbed for the rest of the distance down to the bottom of the sea, there was no disturbance of the webbing whatever, a distance of some thirty to thirty-five feet (tr. 312), so that *there was no opening at all at low tide* (tr 249) or a little below.

WHAT "PASSAGE" DID THE FISH HAVE WITH THIS OPERATION?

"Whatever fish were in the heart below the low tide line would remain there until the tide started to raise" (tr. 309)—(testimony produced by plaintiff in error.)

No free or other passage there at all.

"For few fish get out of the heart unless they jump out" (tr. 302)—and so on all through the record introduced by plaintiff in error itself.

The bottom of the shove-downs were only to low tide (tr. 251) so fish below that had no passage at all, and this during the close season (tr. 252).

A glance at Exhibit A, page 349 of the transcript, will show the Court the manner in which plaintiff in error pretended to comply with this law. The Court will notice the distance between the piles, will notice that in the photograph there is a very small space left open at the water line and that this space was reduced to nothing at low tide, that a space of webbing twenty-five feet in width would be a space that would extend between two sections of piling, or from one pile to the second pile beyond.

The Court will also notice the condition of the webbing; as testified to by plaintiff in error, it becomes filled with dirt, seaweed, etc., and makes

above and below the water a dark wall which, it is testified by plaintiff in error, the fish are afraid of (see tr. 308); that they seek light, and the Court can see with this webbing substantially in place, as it is shown in the photograph, the dark wall of the webbing offers them no light at this point, no notice of an open way, no attraction to a passage way, no *free* passage unless they happen to be actually on the very surface itself; no opening below the low tide; and it is admitted in the record of course that they swim underneath, "below the water line," (tr. 302) and that some fish prefer the deeper waters.

Plaintiff in error, no doubt with intent to shift whatever culpability there may be in this case from its shoulders to the fish, devoted the greater part of what testimony it offered to describing the mental and physical characteristics of the fish with which it clashes; and their habits, and demeanor. For instance, we find the following expressions offered in the evidence of plaintiff in error:

They acted like "other caged animals" (tr. 274) when caught. They are "wary animals" (tr. 277).

When they get in the trap they go right up to the webbing, approach it readily (tr. 277).

They become wary and cautious when they enter the trap (tr. 277)

They first go into the heart (tr. 277).

They "steady around a while" (tr. 278), and then "they are just as liable to go outside as they are inside" (tr. 277).

After they "steady down" in the heart a while then they move about the trap" (tr. 278).

Their habits "are like some other wild animals" (tr. 279).

By their weight they'd tear down a web and get out (tr. 290).

They don't go into the hearts on Sunday, "they go out the opening prescribed by law" (tr. 301).

Keegan (plaintiff in error's witness) saw them back up a ways then make a run and jump over the webbing (tr. 291).

But it is settled that more fish do not get out of the traps than get into them (tr. 290).

The "dog" salmon will not trap without a leader (tr. 279).

But the "king" seeks royal solitude, "he traps by himself" (tr. 279).

And he is a pretty canny animal too (tr. 280).

They climb precipitous places (tr. 292), climb over the falls in large rivers—jump over them (tr. 292).

They are wary and game (tr. 295).

But the testimony that seems to destroy the effect of all the foregoing is that of the witnesses Nelson for plaintiff in error. He says: "They do not go into the hearts in the close season; they go

out the opening prescribed by law" (tr. 301), which is wholly imaginary at low tide.

And "they would not go through the tunnels on Sunday—they would look around for the twenty-five foot opening first" (tr. 303), (*and fail to find it.*)

Plaintiff in error's witness Keegan says the heart is constructed to keep the fish in it until they gradually work their way into the pot (tr. 293).

But never he saw any fish climb up the webbing and crawl over it (tr. 294).

So that it appeared at certain stages of the testimony as though the fish were arrant rogues and law-breakers, gifted with great cunning and cautiousness, indeed, that they are superfish—not fish, but "animals"; at other times that they were savages, giving way to anger, possessed of cruelty and lacking in cultivation of mind or manners; at other times that they, the "dogs" as well as the "kings", were of a military spirit, and made great drives on the webbing of the traps like the Kaiser's army; then again that they were careless oafs disporting, playing, leaping, laughing around the traps, climbing up and over them and through the webs, jumping over barriers, and even at other times leaping over great waterfalls up mighty rivers—sort of bohemians and acrobats; and again that they knew and obeyed the law; but the mat-

ter of their total intellectual attainments was left a mooted question, as, out of deference to counsel's desire, the trial Court refrained from ascertaining whether or not the canneryman is smarter than a fish (tr. 300).

CONCLUSIONS ON THE FACTS.

The Court will easily see that the pretended compliance with the statute by leaving only a small opening in the webbing, is really no compliance at all, the mere fact that some fish may, a part of the time, be able to find exit from the trap through this small opening is no justification. If all fish were wise enough to find this opening then all fish would be wise enough to avoid the trap entirely. The law says that the tunnel *shall be closed* and the 25 *feet* of the webbing shall be either raised or lowered.

ARGUMENT IN REPLY TO ASSIGNMENT OF ERRORS.

The argument of plaintiff in error is divided into three main sections. The first relates to pleadings; the second to instructions of the Court to the jury; and the third to the verdict.

I.

Plaintiff in error makes fourteen assignments of errors numbered from 1 to 14 consecutively. We

will treat of these assignments of error in the order and under the headings as treated in the argument of plaintiff in error.

Specifications Nos. 1 and 2 refer to the demurrers to the several indictments, as to their sufficiency, etc.

The object of the Act, of course, under which the indictments are drawn is to protect and regulate the fisheries of Alaska—a right, of course, which Congress has under the police powers of the Government. Plaintiff in error does not claim that Congress does not have this right but it is conceded. It is charged that plaintiff in error maintained trap nets in the waters of Alaska, in Division Number One, and that during the weekly close season provided by the Act failed to close its tunnel or raise or lower 25 feet of the heart webbing, as commanded by the Act.

We maintain that it is not necessary to allege that it caught a single fish. The law places no such burden of proof upon the Government. It plainly commands that the traps during the close season shall be maintained as prescribed, under penalty of its violation.

But the counts go much further than that, and the evidence follows. They show in what particular waters of the First Division of Alaska the traps were located (tr. 199), and not only that, but that they were actually operating; the evidence verifies the statement made herein that when these

traps are erected and in repair they fish all the time during the whole season in which the fish run, as it shows that they were actually fishing (tr. 169). It is true, on the objection of plaintiff in error to the reception of evidence proving that the traps not only were maintained in violation of law but were actually fishing, the learned trial judge held that this proof was unnecessary, but the Government was able to prove it, and offered it and showed it.

The counts show that the traps were in Icy Straits and in Chatham Straits, in Division Number One, Alaska—therefore, they were not in Cook Inlet, or in the Delta of the Copper River, or in the Bering Sea (the excepted waters); and also showed the dates of the offense, to-wit, the hour prescribed as the close season, and the evidence proves these allegations. None of this evidence was contraverated by plaintiff in error, which contented itself in the presentation of its evidence with attempting merely to prove that it caught only a highly intellectual grade of fish,—thus palliating its offense. The evidence covered all the elements of the offense and was sufficient. It showed that 25 feet of the webbing at the places in the trap called for by the Act was not lifted or lowered; *if it was not lifted or lowered,* it was not lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, or in any other manner.

The arguments heretofore set out in a former part of this brief (on pages from 16 to 27) in regard to the sufficiency of the indictments, we think entirely dispose of the questions raised in specifications of errors Nos. 1 and 2, and therefore need no further discussion.

It will be noted that plaintiff in error's third assignment of error is an allegation that the Court erred in permitting the plaintiff to prove where the fish traps mentioned in the indictments are located. It will be further noted that after assigning this error, plaintiff in error thereafter omits all reference to it and makes no argument to the Court and assigns no reasons why the Court erred in admitting this proof. As a matter of fact, there was no error in its admission and the case would not have been complete had not the venue been proven. No further argument seems necessary on this point.

IN REPLY TO MOTION FOR NON-SUIT OR INSTRUCTED VERDICT.

Plaintiff in error's 4th assignment of error is based upon the proposition that the Court erred in overruling and denying defendant's "motion for non-suit or a directed verdict", which motion is set out on pages 15 to 18 of brief of plaintiff in error.

It seems unnecessary to discuss this motion, for,

as stated, in place thereof it is the same objections as raised by the demurrer to the indictment which have been fully discussed in another part of this brief and need not be further mentioned.

As to the allegation there was an insufficiency of the evidence to sustain the verdict, we would simply say that the discussion of this branch of said motion is fully embraced in our argument upon the facts of the case and we think is conclusive.

Defendant in error's statement of the charge and the facts relating thereto as set out on pages 43, 44 and 45, are incorrect. On page 43 defendant says that the case was tried on the theory that it was only necessary to prove two things:

First, the failure of the defendant during the weekly close season to have 25 feet of the webbing of the heart next to the pot lifted or lowered *vertically in rectangular shape*, or

Second, the failure of the defendant during the weekly close season to have the tunnel of said trap closed, or failure of the defendant to comply with both of the last mentioned conditions.

It will be noted that the first statement is in no wise sustained by the charge in the indictment nor by the proof in the case. There was no effort on the part of the plaintiff to show that the 25 feet of the webbing of the heart next to the pot should be lifted or lowered *vertically in a rectangular shape.* The evidence was directed to the failure of the plaintiff in error to either lift or

lower said webbing as required by the statute *in such a manner as to permit the free passage of salmon and other fishes.* This is purely a question of fact for the jury. The charge in the indictment was fully sustained by the proven facts, which were not denied by the plaintiff in error, and hence there can be no validity in this method of attack as a matter of fact.

As to the second statement on page 43, in regard to the closing of the tunnel of said trap and the failure to comply with both of said last conditions, it fully appears from the proof that neither of these requirements was performed by the plaintiff in error. So that both of these objections as to facts are invalid as the proof fully sustains the charges on these points as set out in the indictment.

LAW AS APPLICABLE TO SAID MOTION FOR AN INSTRUCTED VERDICT.

Such a motion will only be entertained in case of failure of proof after the evidence in behalf of the plaintiff is all in. The circumstance in which a non-suit should be refused have been variously stated, as follows:

(1) when plaintiff makes out a prima facie case.

38 Cyc. p. 1557.

Non-Refillable Bottle Co. v. Robinson 8 Cal. App. 103.

96 Pac. 324.

(2) when on the evidence adduced plaintiff is entitled to have his case, as made by the pleadings, submitted to the jury.

Idem.

* * *

(3) when there is some substantial evidence in support of the plaintiff's case.

Idem, 1558.

Lally v. Prud. Ins. Co. 75 N. H. 188, 72 Atl. 208.

(4) where the evidence and presumption arising therefrom are legally sufficient to prove the material allegations of the complaint.

Idem and cases cited in the note.

(5) where evidence authorizes a finding for either party or where the jury is authorized to put a construction upon the evidence or by any inference they may draw from it, the plaintiff is entitled to recover, or where the evidence in any reasonable view giving the plaintiff the benefit of the most reasonable inference, will support a verdict in his favor.

Indem 1559 and cases there cited.

The 2nd ground of said motion charges that there was no evidence to establish the facts charged in the indictments, and further that the indictments do not allege that the defendant failed to close the gate, or mouth, or tunnel, or to raise the webbing, etc. As to the last part of the charge, it is evidently contradicted by the face of the indictments

themselves, and there could be no good reason why the Court should have sustained the motion for this alleged reason. As to the allegation that there was no evidence to sustain the facts in the case, it is easily to be seen that the record absolutely contradicts the theory therein advanced as the facts abundantly sustain the indictments.

The 3rd reason upon which said motion was based is an allegation that the indictments do not state facts constituting the alleged offense in such a manner as to apprise the defendant of the nature of the charge. Clearly there is nothing in this assignment when the indictments are considered, for the indictments specifically allege wherein and in what manner the law had been violated.

The 4th reason is based upon the allegation that the indictments fail to allege that the fishing was done during the close season. Evidently this is an error, as the indictments are specific as to the time charged.

The 5th ground of said motion is based upon the alleged omission in the indictments to set out any particulars or facts as to the closing of the tunnel and raising or lowering of the webbing in such a manner as to prevent free passage of salmon, etc. This, like the other reasons, is not sustained by the record, for the indictments are specific in this regard.

The 6th reason for said motion alleges that the indictments failed to allege that the locality where

the fishing was done was not in the district or place excepted from the statute and was not with one of the excepted forms of gear, etc., and further that there was not before the jury any evidence to show whether or not any crime had been committed and that it was committed within the prohibited districts of the waters of Alaska. In reply to this reason for said motion we submit that it is not necessary that an indictment should state the places excepted by the statute, as they are not a part of the offense charged, and as all elements of the offense can be and were alleged in the indictments without any specification of said exception. So far as the exception in regard to the forms of gear, etc. used, the indictments show upon their face, by necessary inference, that all such exceptions were exluded from the charge and therefore it could have served no purpose to have set out any of the excepted modes.

Exceptions which are a part of the statute and which must be set out in the pleadings must be such matter as forms a substantive part of the charge or crime described in the indictment.

Where the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception *is matter of defense*, and may be shown by the defense.

U. S. vs Cook, 84 U. S. Repts. p. 168.

A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment or information, unless the matter of such exception of proviso enters into or becomes a part of the description, or a qualification of the language defining or creating it.

State vs. Gee Wo. N. W. (Neb). pp. 513-515.

As to the balance of said charge 6, there can be no doubt but that the proof was sufficient upon the question of whether or not the offense was committed within the prohibited districts of the waters of Alaska. The Court will take judicial knowledge of the boundaries of Division Number One, District of Alaska, which is the part of the District of Alaska lying east of 141st meridian of west longitude.

BOUNDARIES ETC., COURTS TAKE JUDICIAL NOTICE.

Courts take Judicial notice of established boundaries of the states and territories where they are sitting and will know that a certain tract or region is or is not included therein.

16 Cyc. p. 859 sub-sec. b.

Perry vs. State, 113 Ga. 938. Other cases there cited.

and also of the further fact that the excepted waters are not within said district. But further than this, the proof shows that the location of the fish traps, as a matter of fact, are not in the excepted

waters but are in the waters of Icy Straits and Chatham Straits, which are themselves within Division Number One.

The 7th reason for said motion repeats one of the grounds of demurrer, i. e., that the indictments do not charge an offense in such a manner as to enable a person of common understanding to know what is intended, and that the offenses are not alleged with such certainty as to enable the Court to pronounce judgment. These phases of the question have been fully argued in the argument on the demurrers in the former part of this record and need not be repeated.

The 8th ground raises the question as to the sufficiency of evidence to show whether the traps were open sufficiently to admit of the free passage of salmon and other fishes. This is purely a question of fact to be determined by the jury. However, this is not one of the charges in the indictment, i. e., the indictments did not charge that the traps were not so open as to prevent the free running of salmon and other fishes. The charge in the indictments is for maintaining the fish traps contrary to the statute as specified in the indictments, by not doing the things therein required to be done.

II.

EXCEPTIONS TO CHARGE OF COURT.

Under the second division of plaintiff in error's argument upon assignment of errors, assignment of errors Nos. 5, 6, 7, 8, 9 and 10 are treated. After the conclusion of the Court's charges to the jury, counsel for plaintiff in error took two exceptions to that charge, as follows:

> "We ask an exception to the refusal of the Court to give instructions numbered one, two, three, four and five, as offered to the Court We also wish an exception to your Honor's instruction and illustration that you made referring to the raising and lowering of the webbing of the heart, especially the camparison made in reference to the window, when you complete illustrate your definition of what you mention about raising and lowering the webbing of the heart on each side of the tunnel." (tr. 326).

These are the only exceptions taken to the instructions as given by the Court to the jury as provided by Sec. 164, Alaska Criminal Code (Sec. 2273 Compiled Laws of Alaska), or at all.

The five instructions offered by counsel are set forth in plaintiff in error's assignment of errors No. 5 on pages 65 to 68 of the transcript and again on pages 86 to 89 of the transcript, and the instruction given, which was excepted to, is set

out in plaintiff in error's assignment of error No. 6 on pages 68 to 69 of the transcript and again on pages 89 and 90 of the transcript. There is no such exception reserved by plaintiff in error as appears on page 48 of its brief, set out in its specification of error No. 10 or at all. So that counsel did not "particularly" or otherwise object or except to the Court's statement in regard to Bower or Cobb nor to any other part of the Court's instructions, except as above stated, and *it is too late to do so now.*

All of the requests of plaintiff in error, so far as they correctly state the law, are covered in the Court's instructions as given.

And the illustration complained of in the 6th assignment of error appears to be beyond any question of doubt lucid, succinct, plain and illuminating, and states the proposition correctly in its simplest terms. The law says 25 *ft. of the webbing must be lifted or lowered.*

What is the meaning of "lifted?" Lifted means moved in a direction opposite that of gravitation, raised up. What is the meaning of the word "lowered?" Lowered means to let down, to let descend or fall by its own weight.

And counsel themselves say in their brief that this Act must be construed strictly. To lift or to lower does not mean to shove aside or to push or to drive forward or backward. It does not mean, to

use counsel's coined phrase, to "pull back." It needs no construction. It is plain; there is nothing technical about it; the language is simple.

The language is plain and unamgibuous. There is no room for construction. It is a familiar rule that when the language is clear courts have no discretion but to adopt the meaning which it imports."

Phelps vs. Racey, 60 N. Y. 10.

"This statute" (says the Court in the case just cited) "imposed a penalty on any person who should have in his possession any dead game at a certain season. In an action for a penalty the defendant answered that some of the game was in his possession before the passage of the statute, when the killing was not prohibited, and that the remainder was received from another State, where the killing was lawful. HELD, that the Act was not unconstitutional as a regulation of commerce nor as a deprivation of property after due process of law" (syllabus).

And the Court used the language above quoted as to the meaning of the Act.

The law says it shall be lifted or lowered in such manner as to permit the free passage of *salmon and other fishes.* That means, of course, not salmon alone but *all fishes;* those not only which swim near the *surface of the water* but those which

swim lower down as well as those which hug the bottom of the sea. For instance, the halibut, which do not affect the surface but take to the lower levels. It means that all fish shall have an unobstructed right of way through these traps for thirty-six hours each week—a roadway 25 feet in width; not simply the fish that manage to get into the trap.

It does not say in such manner as to permit *free escape* of fish—it says *free passage.* So that those coming upon the traps may see from any distance an open roadway through these traps, not a little cranny that they may search for or stumble on by accident, but one which they may pick up from a distance and pass through; not only to escape the deadly traps themselves but from other enemies as well, it must be free, unobstructed—a clear track over and through which they have right of way. It means that these traps shall be absolutely put out of fishing condition during the whole of the close season, and that all fish swimming in the waters where these traps are located shall have free passage through them for all that time.

If the webbing is lifted it must be lifted above the high tide line; if lowered it must be lowered at least below low tide line, and sufficiently below low tide line to permit all fish to pass through it freely, without obstruction, even if necessary to drop the webbing to the bottom of the sea.

The illustration of the learned trial judge follows the language of the Act and also complies with counsel's contention of strict construction; it is clear, it is common sense, and it is convincing; and it is as follows:

"Now, the indictment in this case is drawn under a certain section of the statute. I will read you that section:

"'Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lower in such manner as to permit the free passage of salmon and other fishes.'

Now, I will tell you, gentlemen, what I think that section means, and, first, I will say that I think it means just exactly what it says. I don't think there is a superfluous word in that section, nor a word that doesn't express its meaning. Now, let us see: 'Throughout the weekly close season herein prescribed'—The statute has just prescribed that from six o'clock Saturday afternoon to six o'clock Monday morning is the weekly close season. Now, it says: 'Throughout the weekly close season herein prescribed—(that is the time now)—the gate, mouth or tunnel'—some people call it a gate, some call it a mouth, some call it a

tunnel, so it says: 'The gate, mouth or tunnel of all stationary and floating traps'—some traps are stationary and some floating, evidently, but the section takes them both in—'of all stationary and floating traps shall be closed *and*—(it doesn't say *or*)—twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes.' Now, let us see—it wouldn't do to say that some of the net or webbing shall be lowered, unless the statute says how much shall be lowered so the statute says twenty-five feet of the webbing or net shall be lowered or raised. If the statute stopped there, it would not be definite, because it wouldn't say what part of the webbing of the heart of the fish-trap, so it is going to be definite about that, so it says; 'twenty-five feet of the webbing or net of the heart of such trap.' That wouldn't be definite if it stopped there, because the heart of a trap has two sides, so it says, in order to make that definite: 'Twenty-five feet of the webbing or net of the heart of the trap on each side'—each side means both sides, consequently—'twenty-five feet of the webbing or net of the heart on both sides'—that wouldn't be definite if it stopped there, because the heart extends over

some little distance—' what part of the heart?' —Then it says: 'The heart next to the pot.' What is to be done with it, this twenty-five feet of the webbing of the heart next to the pot on both sides of the heart—what is to be done with it? It shall be "lifted or lowered." Now, there is the conjunction 'or'—either one, either lifted or lowered. Is that the end of the section? No. It not only says twenty-five feet of the webbing of the heart next to the pot on each side be lifted or lowered, but that twenty-five feet must be lifted or lowered in a certain way or to accomplish a certain end and so it says that it must be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

"Now, that is a positive command, gentlemen, that twenty-five feet of the net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that the twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide the window-pane in two parts. Suppose that window-pane were actually in two separate parts, so that

each part could be lowered or raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating.) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that—I am asking you to raise or lower it. Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of the twenty-five feet."

Where the instructions given by the Court in a criminal case cover all points set forth in defendants request and correctly state the law on all points upon which the Court was required to charge under the issues, the refusal of the instructions requested are no error.

Stockslager vs U. S. 116 Fed 590-599.

Referring again to the matter on page 49 of plaintiff in error's brief, in regard to Cobb and Bowers, counsel certainly are optimists—if they found a buttonhole they would imagine they had

found a suit of clothes. There is no such matter in the record, and contrary to counsel's apprehension we do deny it. The only place in the testimony where Bower's name is mentioned—(and Cobb's not at all)—is in the transcript on pages 173 to 180, and which contains all that was said about Bowers, nothing being said about Cobb and no intimation that Bowers had agreed with Plainiff in error. And as for the statement made in consul's brief—there is absolutely nothing to support it. As stated above, there was no exception taken to this part of the charge to the jury; but in passing we may say that the only construction ever put upon this Act by the Department having charge of the fisheries is contained in the report of the Deputy Commissioner of Fisheries, Dr. E. Lester Jones, for the year 1914 (Gov't. Printing Office, 1915), which gives the same meaning to the Act as has been given by the trial Court herein.

Counsel's citations under this head are based upon an "if." They say: "IF the statute **** provides for the appointment of **** officers", "and IF they were fish wardens", "and IF the construction****was****a departmental construction", "the instruction of the Court given is erroneous."

This is somewhat like Peter's "IF" in Romeo and Juliet, where the nurse says to Peter:

"And thou must stand by too, and suffer every knave to use me at his pleasure?"

"Peter. I saw no man use you at his pleasure; IF I had, my weapon should quickly have been out, I warrant you. I dare draw as soon as another man, IF I see occasion in a good quarrel, *and the law on my side.*"

Counsel's IF is like Peter's IF; it is impossible to argue it.

III.

As to the third sub-division of the argument of plaintiff in error, that which actually occurred in court at the time the verdict was rendered appears on pages 327-328 of the transcript, and not as plaintiff in error has stated in his brief. It is true, that after the trial in the court below, plaintiff in error pursued what we consider a rather reprehensible practice and procured the signatures of some of the jurors to affidavits which they now set up as basis for an argument to impugn the verdict of the jury. On pages 327-328 of the transcript, as stated above, the following appears to have occurred at the rendition of the jury's verdict:

"At about 5 o'clock P. M. October 30, 1914, the jury returned into court; whereupon the following proceedings were had: The roll of the jury was called; each juror answered to his name.

The Court: Gentlemen of the jury: Have you agreed upon a verdict?

The Foreman: We have.

The Court: Hand it to the bailiff.

The bailiff takes the verdicts and hands them to the Court who opened the verdicts and handed them to the Clerk.

Foreman of the Jury: Judge, is there any way we can modify that?

The Court: You mean you want to ask for the clemency of the Court, is that it?

Mr. Gabbs (Foreman of the Jury): Yes, that is it. We think that while the defendant has violated the letter of the law it has not violated the spirit of the law.

The Court: Well, if you wish, you may insert in your verdict 'with recommendation of the mercy of the Court.' If you have agreed upon that.

Mr. Gabbs: We have.

The Court: Then you may sit here and insert it right in your verdict.

The Foreman: Would the word 'clemency' be the same thing?

The Court: Yes.

Whereupon the Court read the verdicts and defendant's attorney, Mr. Winn, requested thereupon that the jury be polled.

Thereupon the Clerk polled the jury, asking each juror individually, 'Is this your verdict?' Each juror answered, 'Yes, it is.'

The Court: Mr. Gabbs, as foreman of the jury,

you will make the statement you have made to me a while ago.

Mr. Gabbs: *We agreed that the defendants are found guilty as charged;* but thoroughly believe they have erred in the letter of the law and not in the spirit of the law.

The Court: Very well; let the record show that.

Mr. Winn: Your Honor, please, under that statement made (to save the record) by the foreman of the jury, we object to the receiving and filing of these verdicts as the verdicts of the jury.

The Court: Let the record show that."

While denying that this proceeding constituted the rendition of special verdicts in this case and without admitting the right of the jury in this jurisdiction to render special verdicts (and it has never been the practice in this District to do so), we contend that a special verdict, where permissible, is one finding facts only, and it is for the Court to draw therefrom the conclusions of law.

In this case Mr. Gabbs, the foreman of the jury, attempted to interpret the law, (which was a matter entirely outside of his province as a juror and contrary to the Court's instructions to him) by stating what he believed the spirit of the law to be; and it was his own individual statement merely. That counsel for plaintiff in error had previously offered and asked the Court to give certain instructions to the jury containing the words "spirit

of the law" may or may not account for the choice of words used in that expression by Mr. Gabbs.

The question of intent does not enter into this requirement of the act, and it would be a farce to render any verdict other than one of guilty in this case under the circumstances and under the law as given by the Court in its instructions, and under the evidence as heard by the jury. The law provides that the things commanded to be done must be done and that is all there is to it. If the plaintiff in error did not do what it was commanded to do, it was guilty. And the jury at all times insisted that the defendant was guilty. We do not imagine that Mr. Gabbs when he made that remark to the Court figuratively held the Standard Dictionary in one hand and Webster's in the other and intended to tell the Court that the defendant had not destroyed the vital energy of the law but that it had merely choked the breath out of it—merely violated it. But we do know he intended ed to tell the Court that *all the jury agreed that the defendants are found guilty*—that is unequivocal. He thought he knew more about the intent of the law than the Court did. And finally, Mr. Gabbs having made his statement to the Court, found no echo from any of the other jurors. There was no response or endorsement of his statement, and before he made the insertion in the verdict he himself told the Court that that was exactly what he

meant, that he desired to include in the verdict a recommendation for clemency; and after the verdicts were read to the jury, the jury was polled and each and every one of the jurors said, without equivocation or qualification, that that was his verdict, and, that having been done, it was the verdict of the jury.

The criticisms made by counsel for plaintiff in error on this subject are without basis and therefore need not be commented upon.

We respctfully submit that the pleadings were sufficient, that the Court committed no error with reference to instructing the jury or otherwise, that the Court committed no error in receiving the verdicts of the jury or in refusing a new trial, and that in none of the specifications of error set forth by the plaintiff in error has its contentions been sustained; and that the judgment herein should be affirmed.

Respectfully submitted,

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